Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Procedures for Reviewing Requests for Relief From State and Local Regulations Pursuant to Section 332(c)(7)(B)(v) of the Communications Act of 1934	)	WT Docket No. 97-192

To: The Commission

REPLY COMMENTS OF
THE NATIONAL LEAGUE OF CITIES
AND THE NATIONAL ASSOCIATION
OF TELECOMMUNICATIONS OFFICERS AND ADVISORS

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October 24, 1997

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SUMMARY

Industry's opening comments reflect a fundamental misreading of the narrow and limited jurisdiction Congress granted the Commission under Section 332(c)(7). Both individually and collectively, virtually all of industry's proposals -- to allow the FCC to review non-final local decisions, to reweigh and second-guess the evidence before local governments, to preempt totally decisions based only partially on RF emissions, to impose a blanket national deadline within which local governments must act, to place an arbitrary deadline within which the FCC must act, and to allow wireless providers to disregard local decisions on the mere filing of a petition with the FCC -- would have the effect of encouraging wireless providers to file petitions with the Commission rather than pursuing the court remedy Congress provided. That, however, would be clearly contrary to the statute, since Congress left no doubt that it intended to "prevent Commission peremption" except in "limited" circumstances and that Commission review would be the exception, not the rule.

Moreover, industry citations to court decisions to date under Section 332(c)(7) merely underscore our point: The court remedy Congress provided is more than adequate, and thus there is no need for the Commission to distort the jurisdictional line between the courts and the Commission that Congress has drawn.

Industry efforts to persuade the Commission to "scrutinize the record carefully" even where a local decision "is not explicitly based on RF emissions" must be rejected. Any such

scrutiny would be a direct usurpation of the courts' exclusive jurisdiction to weigh the substantiality of the evidence under Section 332(c)(7)(B)(iii). Similarly, industry's admission that "partial preemption" is unworkable points to but one conclusion: Such disputes should be left to the courts which, unlike the FCC, would have jurisdiction over the entire dispute.

Likewise misguided is industry's contention that the FCC, unlike the courts, may review any "act" -- even a non-final decision -- by a state or local government. The only sensible reading of Section 332(c)(7)(B)(v) is that the reference to "act or failure to act" in the last sentence of that subparagraph is a short-hand reference to "final action or failure to act" in the first sentence. Any other reading would lead to absurd results: asymmetrical review, improper expansion of the FCC's "limited" jurisdiction, and violation of all policies served by finality and exhaustion of remedies.

Industry's concession that "failure to act" is fact-specific dooms its proposal to set a nationwide deadline within which local governments must act. Any such deadline also would be directly contrary to Congress' desire to "prevent Commission preemption" and its directive that wireless providers not receive preferential treatment in zoning requests. Since "failure to act" is fact-specific, the issue should be left to the courts.

With regard to the NPRM's proposals concerning procedures to be followed in the filing of subparagraph (iv) petitions, the 10-day deadline for oppositions under 47 CFR § 1.45(a) is entirely

inappropriate. Local governments should be given, at a minimum, at least 30 days to respond to a petition. As the industry concedes, such petitions will be intensely fact-based, and FCC rules routinely give parties at least 30 days to respond in analogous circumstances. See 47 CRF §§ 1.223 and 76.975(e).

For similar reasons, industry's proposal that the FCC adopt a self-imposed 30-day deadline to act on petitions is unwarranted. There is no statutory basis for the FCC to give such preferential treatment to wireless providers filing subparagraph (iv) petitions. Moreover, any arbitrary, self-imposed decisional deadline is entirely inappropriate for what the industry concedes will be fact-based proceedings. To the extent industry seeks expedition, the court remedy in subparagraph (v) provides it.

The public, public interest groups, and other local governments and local government associations should be allowed to participate in subparagraph (iv) proceedings. However, only a wireless provider that participated before the local government and was aggrieved by its decision should have standing to file a petition.

The strict default procedure proposed by Primeco and US West is contrary to Congressional intent and would have the impermissible effect of encouraging providers to file petitions with the FCC rather than pursuing the court remedy favored by Congress. The default proposal is also inconsistent with Commission practice in the context of default rules.

Industry's predictable support for the NPRM's presumption of RF compliance ignores that RF compliance is a statutory prerequisite for FCC jurisdiction. Moreover, the presumption would have the perverse effect of making detection of public safety violations extraordinarily difficult. For similar reasons, industry proposals that local governments bear the cost of showing compliance should be rejected.

Finally, the record supports allowing local governments to require providers to make the more detailed compliance showing in ¶¶ 144 and 146 of the NPRM. The record also supports not limiting local governments' flexibility to require additional information where circumstances warrant.

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The National League of Cities ("NLC") and the National Association of Telecommunications Officers and Advisors ("NATOA") submit these reply comments to the opening comments filed in response to the Notice of Proposed Rulemaking, released August 25, 1997, in the above-captioned proceeding ("NPRM").

INTRODUCTION

Unfortunately, but not surprisingly, the opening comments in this proceeding divided largely along predictable lines. Industry urges the Commission to take an incredibly expansive view of its jurisdiction. On the other hand, both state and local governments, as well as interested members of the public, raise serious concerns that the NPRM proposals would, as a practical matter, fail to provide adequate procedures to protect

the public from radiofrequency ("RF") emissions in excess of the Commission's requirements.

As set forth in our opening comments and explained further below, the Commission should reject the industry's invitation to obliterate the jurisdictional boundaries of Section 332(c)(7)(B). The industry's position is at odds both with the statutory language and the legislative history of Section 332(c)(7). It also would lead to absurd results.

On a more practical level, however, the opening comments in this proceeding reveal a serious public confidence problem that the Commission and industry must correct. Industry concedes, as it must, that the actions of state and local governments "are taken on behalf of their constituents" (BellSouth Comments at 6) -- in other words, the public that lives and works in a particular community. And what the record reveals is a public that is quite skeptical of the ability of industry and the FCC adequately to protect them from excessive RF emissions.[1] The record further reveals that this concern is not unwarranted, for it contains evidence of non-compliance with FCC RF emission standards and other FCC rules by wireless providers.[2]

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[1] See, e.g., San Francisco Comments at 5-7; New York City Comments at 4-5; Comments of Diane Haavind; Cellular Phone Taskforce Comments at 6; Concerned Communities ("CCO") Comments at 14-18; Comments of Laura Arnold; San Juan County Comments; Jefferson Parish Comments; Ad Hoc Association Comments at 1-14; Comments of Mark Hutchins; Vermont Environmental Board Comments at 3-8.

[2] See, e.g., San Francisco Comments at 6-7 & attached Declaration; Cellular Phone Taskforce Comments; Ad Hoc Association Comments at 14.

Industry, in contrast, apparently perceives the public as an obstacle to be circumvented with a "quick and efficient" FCC preemption process. E.g., PCIA Comments at 4. Industry wants the FCC to exercise broad jurisdiction overly virtually all local decisions -- even admittedly non-final ones -- where any member of the public expresses RF concerns.[3] Moreover, industry urges the FCC to skew its procedures by imposing tight deadlines on local governments, imposing strict default sanctions, and to limit, if not bar altogether, participation by the public (although apparently not by industry associations).[4]

Aside from its legal infirmities (which are many), the industry's position would succeed only in fanning the flames of public distrust and skepticism. Long term, that should not be in the interest of the Commission or industry. Industry seems sometimes to forget that the members of the public whose concerns it belittles here are also its future potential customers --and alienated potential customers are not a promising source of future revenue.

In these circumstances, NLC and NATOA agree with the Vermont Environmental Board that what is needed is not further preemption. Rather, the Commission should devote additional

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[3] See, e.g., AT&T Comments at 6; PCIA Comments at 6-8; GTE Comments at 2 & 5; Sprint Comments 2 & 4-7; CTIA Comments at 5-6; BellSouth Comments at 3-4; Primeco Comments at 14; US West Comments at 20-21; SWB Comments at 5.

[4] See, e.g., AT&T Comments at 6; PCIA Comments at 5-6; GTE Comments at 2-3; Sprint Comments at 6; Ameritech Comments at 7; CTIA Comments at 5; BellSouth Comments at 6; Primeco Comments at 3 & 15-18; US West Comments at 4 & 22; SWB Comments at 8.

resources to working with state and local governments to adopt mechanisms that will provide the public with better assurance that RF emission safety requirements are being met. See Vermont Environmental Board Comments at 3 & 8. Local governments stand ready to cooperate with the Commission in such an effort. Cooperation, not confrontation, is in the mutual interest of all concerned.

I. INDUSTRY GROSSLY OVERSTATES THE LIMITED ROLE CONGRESS ASSIGNED TO THE COMMISSION IN SECTION 332(c)(7).

A. Industry Suggestions That the FCC's Jurisdiction Is "Broad" and "Exclusive" Are Clearly Incorrect.

Industry comments and proposals in response to the NPRM are almost uniformly predicated on the notion that the Commission has jurisdiction under Section 332(c)(7) to "broadly preempt" local decisions[5] and that the FCC has "exclusive" jurisdiction over RF emission disputes under Section 332(c)(7)(B)(iv).[6] In fact, as we pointed out in our opening comments (at 5-7), neither proposition is true: both the statutory language and the legislative history make plain that the Congress wanted to "prevent[] Commission preemption" except in very "limited circumstances,"[7] and that both the courts and the FCC share jurisdiction under subparagraph (iv), with the courts retaining

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[5] See, e.g., Primeco Comments at 11.

[6] See, e.g., id. at 2 & 5; CTIA Comments at 4. PCIA even goes so far as to assert that courts do not have jurisdiction over subparagraph (iv) disputes. PCIA Comments at 3.

[7] H.Rep. No. 104-458, 104th Cong., 2d Sess. 208 (1996) ("Conference Report") (emphasis added).

"exclusive" jurisdiction over all other disputes arising under Section 332(c)(7).[8]

Industry members' misperception of these critical points infects virtually all of the proposals they make in their comments. Thus, industry invites the Commission to inject itself into local proceedings before local government has even rendered a final decision, to reweigh and second-guess the evidence before a local government even if the local decision is not on its face based on RF emissions, to totally preempt local decisions that are only partially based on RF emissions, to impose blanket nationwide deadlines on local decisions (apparently whether they are based on RF emissions or not), and to allow wireless providers to commence building facilities upon the mere filing of a petition with the FCC (apparently in flagrant disregard of local law requirements).

The breadth of these proposals is astounding, particularly in light of the fact that not one industry commenter questions the adequacy of the court remedy available under Section 332(c)(7) to resolve the problems about which industry complains. To the contrary, CTIA and Sprint Spectrum cite court precedent making clear that courts are more than capable of resolving such disputes effectively.[9] In fact, as we now show, each of these

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[8] Id. See also NLC/NATOA Comments at 5-7.

[9] See, e.g., CTIA Comments at 6, 8 & nn. 17 & 18 (citing court decisions under Section 332(c)(7)); Sprint Comments at 2-3 & 4-5.

expansive industry proposals is flatly at odds with the statute, and should be summarily rejected by the Commission.

B. Industry Proposals For The Commission To Look Behind Local Decisions That Are Not Based on RF Emissions and To Preempt Decisions Only Partially Based on RF Emissions Would Completely Obliterate the Jurisdictional Boundary in Section 332(c)(7).

Industry members' responses to the NPRM proposals to "look behind" local decisions not based on RF emissions and to "partially preempt" local decisions serve only to confirm the wisdom of NLC and NATOA's position on this issue in our opening comments: The Commission should confine itself to reviewing local decisions that on their face are based on RF emissions, leaving all other disputes to the courts.

AT&T Wireless, for example, believes that "[e]ven if a state or local decision is not based explicitly on RF emissions," the Commission nevertheless "should scrutinize the record carefully for evidence that RF emissions actually provided a basis for the decision."[10] This open-ended invitation to Commission inquiry simply cannot be squared with the statute.

First, Commission "scrutiny" of the local record in this manner would be a direct usurpation of the courts' exclusive jurisdiction under subparagraph (iii) to weigh the substantiality of the evidence supporting a local government's decision. Second, industry's proposal stands on its head Congress'

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[10] AT&T Comments at 6 (emphasis added). Accord PCIA Comments at 7-8; GTE Comments at 5-6; Sprint Comments at 7; Ameritech Comments at 5; CTIA Comments at 5-8; BellSouth Comments at 3-4; Primeco Comments at 14; US West Comments at 20-21; SWB Comments at 5.

professed desire to "prevent[] Commission preemption" except in "limited circumstances." Conference Report at 207-08. Instead, when coupled with industry's companion proposal for the Commission to review non-final local decisions, Commission review of local decisions would become the rule rather than exception under the industry's approach.

Industry proposals concerning local decisions based "partially" on RF emissions suffer from the same defects. PCIA, for instance, concedes that "partial preemption" is "practically unworkable." PCIA Comments at 8 n.15. Similarly, Primeco admits that a local decision "is not easily severable into 'RF' and 'non-RF' provisions." Primeco Comments at 14. The obvious solution, of course, is the one we proposed: Leave such disputes to the courts which, unlike the Commission, have jurisdiction over the entire dispute. In contrast, PCIA's and Primeco's solution -- for the FCC to preempt a local decision entirely even though it is only partially based on RF emissions -- would improperly invert the jurisdictional roles of the courts and the FCC under the statute.

Moreover, as the industry's own comments reveal, there is simply no need whatsoever for the Commission to engage in the misguided exercise of trying to distort the jurisdictional boundaries of Section 332(c)(7) in this manner. Industry comments cite several examples where courts, exercising their

broad authority, have granted relief from local decisions pursuant to Section 332(c)(7)(B).[11]

Perhaps intentionally, industry overlooks completely the significance of these court decisions to the Commission's proceeding here: To the extent that local governments may have on occasion failed to comply fully with Section 332(c)(7)(B), the court remedy provided by Congress has been more than adequate. The Commission should reject industry's invitation to stretch its jurisdiction, and the Commission should see industry's invitation for what it is: a naked, brazen effort to forum shop and, at the same time, multiply the burden and expense that industry can impose on local governments to bludgeon them into submission.

II. INDUSTRY MISCONSTRUES THE MEANING OF "ACT OR FAILURE TO ACT" IN SECTION 332(c)(7)(B)(v).

A. Subparagraph (v) Cannot Plausibly Be Construed To Allow The Commission, Unlike the Courts, To Review Non-Final Local Decisions.

Several industry commenters claim that under Section 332(c)(7)(B)(v), "final action" is a prerequisite only to court review, and that the Commission, unlike the courts, may review any "act" -- even a non-final decision -- by a state or local

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[11] See, e.g., CTIA Comments at 6, 8 & nn. 17 & 18 (citing (Seattle SMSA Limited Partnership v. San Juan County, No. C96-15212 (D. Wash. Apr. 11, 1997); Illinois RSA No. 3, Inc. v. County of Peoria, No. 96-3248 (D. Ill. Apr. 28, 1997). In re Appeal from Decision of Meridian Council Powertel/Memphis, Inc., No. 97-CV013(R) (May 7, 1997); Westel-Milwaukee Co. v. Walworth County, 1996 Wisc. App. Lexis 1097 (Wisc. App. Sep. 4, 1996); In re Appeal of Graeme and Mary Beth Freeman, 1997 WL 467031 (D. Vt. Aug. 11, 1997)); Sprint Comments at 2-3 & 4-5 (citing Sprint Spectrum L.P. v. Jefferson County, 968 F. Supp 1457 (N.D. Ala. 1997); Sprint Spectrum L.P. v. Town of Dover, CA-97-11264-DPW (D.Mass.)).

government.[12] This claim rests entirely on a rather stilted -- and implausible -- reading of subparagraph (v), which provides:

> Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief.

47 U.S.C. § 332(c)(7)(B)(v).

According to industry commenters, the failure to repeat the term "final action" in the last sentence of subparagraph (v) concerning petitions for Commission relief means that the Commission, unlike the courts, may review non-final local "acts." But this construction fails to look at subparagraph (v) as a whole, is at odds with the legislative history, and would lead to absurd results. See Field v. Mans, 116 S. Ct. 437, 442-42 (1995). It therefore must be rejected.

We begin with the words of the statute. When subparagraph (v) is read as whole, the phrase "act or failure to act" in the last sentence must be construed to be a short-hand reference to "final action or failure to act" in the first sentence of the subparagraph. Congress did not, for instance, repeat the term

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[12] See PCIA Comments at 6; CTIA Comments at 3; BellSouth Comments at 2; Primeco Comments at 11; US West Comments at 19; SWB Comments at 3.

"final action" again in the last phrase of the sentence concerning the 30-day court deadline, yet no one would seriously suggest that the term "final action" was not intended.

Moreover, any other reading makes no sense: it would mean that courts and the FCC are governed by the same "failure to act" standard (since the identical phrase is used in both the first and the last sentence of subparagraph (v)), but not by the same standard concerning actions by state and local governments. Such a peculiar, asymmetric result undermines any suggestion that Congress intended the Commission to enjoy a different jurisdictional standard than the courts, since even industry would have to concede that at least half of the Commission's jurisdiction standard -- concerning "failure to act" -- is identical with the courts'.

Industry's expansive reading of "act" is also flatly at odds with the legislative history. First, the Conference Report specifically addressed the meaning of "final action," making clear that the term meant "final administrative action" at the state or local level, but not exhaustion of state court remedies. Conference Report at 209. If Congress truly intended that petitions to the Commission would be governed by a wholly different standard, one would expect Congress to say so, but it did not. See Field v. Mans, supra.

Second, if the Commission, unlike the courts, had jurisdiction over any non-final "act" by a local government -- particularly in light of industry's companion position that even

decisions not facially based on RF emissions are subject to FCC review -- then the Commission would enjoy far broader jurisdiction than the courts under Section 332(c)(7). Yet that is precisely the result Congress did not want: Section 332(c)(7) was designed to "prevent Commission preemption" except in "limited circumstances." Conference Report at 207-08.

Finally, industry's view that the Commission may review non-final local decisions is at odds with all notions of finality and administrative and judicial economy, and would lead to absurd results. As the Seattle City Council noted (at 1), industry's reading would force a city to defend a departmental decision that the council had not even reviewed yet. It also would encourage wireless providers to circumvent, rather than to participate in, local procedures; would short-circuit the fact-gathering process at the local level, depriving the Commission of all of the relevant facts and thus threatening to moot any decision the Commission might make; and would result in multiple and simultaneous review proceedings -- before the Commission, the local council, and then the court -- of the same initial local decision. All of these wasteful and counterproductive results are, of course, precisely why the doctrines of exhaustion of remedies and finality exist. See, e.g., 2 K. Davis & R. Pierce, Administrative Law Treatise § 15.2 at 309 (3d ed. 1994).

Industry offers no sound policy justification for its counterintuitive position that the FCC should review admittedly non-final local decisions. To the extent that industry worries

about delay, the meaning of "failure to act" should be of greater concern. But industry cannot plausibly claim that phrase has a different meaning for the FCC than for courts. Accordingly, the Commission should conclude that it is subject to the same "final action" requirement as the courts.[13]

B. Industry Agrees That "Failure to Act" Is Fact-Specific, and Thus Any Sort of Uniform National Deadline Would Be Inappropriate.

There is widespread agreement among industry commenters that "failure to act" is fact-specific and can only be determined on a case-by-case basis. BellSouth, for example, concedes (at 3) that "it would be difficult to come up with a representative amount of time that would demonstrate failure to act . . . . Averages, therefore, would not be particularly useful."[14]

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[13] To the extent industry's tortured reading of "act" is motivated by a desire to challenge a generally applicable local ordinance facially rather than awaiting a decision on an application under that ordinance (Primeco Comments at 12), there is no need to sacrifice all normal principles of finality to achieve that result. If, as Primeco hypothesizes (at 12), a local ordinance truly "flagrantly violates" subparagraph (iv) on its face, then a facial challenge might indeed exist -- after all, the generally applicable ordinance is of course a final action. We caution, however, that the Commission should confine itself to truly facial challenges that otherwise satisfy the requirements of subparagraph (iv). Providers should not be allowed to circumvent the normal local permit process unless the applicable ordinance on its face clearly violates subparagraph (iv).

[14] Accord, AT&T Comments at 7 (proceedings will be "fact-based"); GTE Comments at 10 (decision "is largely factual"); Sprint Comments at 3 (noting "tremendous variations in the provisions of state zoning enabling acts and zoning ordinances"); Primeco Comments at 12 (agrees that "failure to act" must be determined on a case-by-case basis); US West Comments at 19 n. 58 (agrees that "failure to act" should be determined case-by-case); GTE Comments at 4 (agrees with case-by-case determination of "failure to act").

Thus, both industry and local government appear to agree that any sort of national average time for disposing of applications is irrelevant to determining whether a local government has failed to act in a reasonable period of time. Logically, these concessions by industry should mean that industry members agree with our position that the Commission should leave fact-specific determinations on "failure to act" issues to the courts. Unlike the FCC, courts have exclusive jurisdiction over subparagraph (ii) "reasonable period of time" determinations and, in addition, superior access to the evidence that must be developed and weighed to make such an inherently fact-based determination. See NLC/NATOA Comments at 9-10.

But while industry generally agrees that "failure to act" is fact-based and nationwide averages are irrelevant, some industry commenters nevertheless -- and inconsistently -- urge the Commission to adopt a uniform national deadline within which local governments must act to avoid being treated as a "failure to act." CTIA (at 5) suggests a national 90-day deadline, GTE (at 2) a six-month deadline, and Sprint (at 6) a deadline of 120 days or the applicable local time limit, whichever is less. Sprint and GTE go even further, with Sprint (at 2) saying that a local government's failure to act within the national deadline should be "deemed [an] approval" of the wireless provider's request, and GTE (at iv & 11) asserting that the mere filing of a petition with the FCC should give a wireless provider license to

disregard local laws entirely and proceed with construction of facilities.

These proposals cannot be squared either with the record or the statute. Having conceded that "failure to act" is fact-specific, industry has also effectively conceded that there is no record basis whatsoever for imposing a uniform national deadline at all, much less for determining what the length of time for such a deadline should be.

Moreover, any sort of national deadline -- as well as Sprint's "deemed approved" proposal and GTE's "preemption-on-filing-with-the-FCC" proposal -- would fly in the face of the clearly expressed will of Congress. A Congress that sought to "prevent Commission preemption" except in "limited circumstances" and ordered the Commission to "terminate[]" any rulemaking proceeding concern placement of wireless facilities (Conference Report at 207-08) would be surprised to learn that it had instead given the Commission sweeping authority to adopt by rule a uniform nationwide deadline for local actions concerning the placement of such facilities.[15]

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[15] Congress would be even more surprised to learn that rather than "prevent[ing] Commission preemption", it had instead allowed the Commission to adopt rules that would effectively preempt local decisions without the Commission even having to review or act on any request by a wireless provider under Section 332(c)(7)(B)(v). Yet that would be the result of Sprint's proposal that a provider's request to a local government be "deemed approved" if not acted on within a specified time, and GTE's proposal to allow a wireless provider to disobey local law and proceed with construction based on the provider's mere filing of a petition with the Commission.

Furthermore, any sort of national deadline would flout Congress' clear intention that wireless providers not receive preferential treatment over others in the local processing of zoning requests -- an intent that the NPRM (at ¶ 138) specifically recognizes. Other than industry's obvious, but irrelevant, desire to rewrite the statute, it offers no reasoned legal or factual basis whatsoever for its proposals to impose national deadlines on local zoning decisions.

In addition to its obvious legal defects, the national deadline proposals make no practical sense. Industry conveniently seems to forget that even if the Commission could permissibly adopt such a deadline (and we believe it clearly could not), the deadline would by definition only be applicable to those "failures to act" that meet the requirements of subparagraph (iv) -- in other words, only those "failures to act" that are based on RF emissions and where the facilities proposed comply with FCC rules. But since it would be impossible to know whether a particular local government's inaction met these jurisdictional requirements until after the Commission ruled on the underlying petition, it would also be impossible for local governments and wireless providers to know in advance whether the national deadline was even applicable to a particular local government's inaction. Thus, the likely result -- particularly when coupled with industry's proposal for the Commission to look behind and scrutinize the local record -- would be a flood of

petitions filed at the Commission by providers on any local request that had not been acted on by the national deadline.

Such a result would not only be a tremendous waste of resources; it also would be clearly contrary, once again, to Congress' desire in Section 332(c)(7) that Commission preemption be the exception and not the rule. In fact, industry's proposals in this regard are a thinly disguised effort by industry to persuade the Commission to usurp the role of courts under Section 332(c)(7). The Commission is duty-bound to reject such an effort to circumvent the statute.

In the end, industry's concession that "failure to act" is inherently fact-based points unequivocally in favor of NLC's and NATOA's position in our opening comments: No national deadlines can be imposed, and the Commission should leave such disputes to the courts as much as possible.

III. INDUSTRY PROPOSALS CONCERNING THE PROCEDURES FOR COMMISSION PROCEEDINGS UNDER SECTION 332(c)(7)(B)(iv)-(v) ARE, FOR THE MOST PART, NAKED ATTEMPTS TO TILT THE SCALES IN INDUSTRY'S FAVOR.

Industry commenters make several proposals concerning the procedures that should be followed in Commission proceedings instituted under the last sentence of subparagraph (v). With a few exceptions, however, most of these proposals appear to be designed more to stack the deck against local governments than to serve what should be the Commission's goals: to ensure a fair opportunity for all parties to be heard and to develop a full, complete and reliable factual record.

A. The FCC Should Allow Local Governments Thirty Days, At A Minimum, To Respond To Petitions by Providers Under Subparagraph (v).

The NPRM (at ¶ 149) proposed that petitions under subparagraph (v) be treated as requests for declaratory ruling under 47 CFR § 1.2 and that 47 CFR §§ 1.45-1.49 govern the pleadings and deadlines in such review proceedings. Section 1.45(a), in turn, provides that oppositions are due within 10 days of the filing of a petition. Since the wireless provider will of course be the petitioner in such cases (see Part III(B) below), that would mean that a local government would have only 10 days to respond to the petition. At least one industry commenter supports such a ten-day deadline. See Primeco Comments at 15.

Ten days is entirely too short a time for a local government to respond to a wireless provider's petition, for several reasons. First, as the Commission is aware, unlike wireless providers most of the nation's 30,000 local governments do not have expert FCC counsel in Washington, nor are their city and county attorneys familiar with, and in most cases, even have ready access to, FCC rules and decisions.

Second, in many instances local governments must obtain city council or county commission approval to hire outside counsel, such as FCC counsel. Such approval can be obtained only at council or commission meetings that typically occur only once or twice per month. See CCO Comments at 30-31.

Third, as industry itself concedes, the decision to be made by the Commission under subparagraph (iv) "is largely factual." GTE Comments at 10. In other words, the disputes will be "fact-based." AT&T Comments at 7. As a result, proceedings under subparagraph (iv) will of necessity be "adjudicative" in nature. Primeco Comments at 17. Requiring local governments to assemble such an inherently fact-based response in only ten days is unrealistic and unfair.

Fourth, conspicuously absent from industry's comments is any proposal for a deadline after a local government decision is made within which a wireless provider must file its petition with the FCC. The result is obvious: The petitioning wireless provider will have far longer to prepare its fact-based petition than the local government will have to prepare its fact-based opposition. Indeed, even the 30-day deadline for court review under subparagraph (v) gives the complaining provider three times as much time to prepare its petition than the NPRM's 10-day proposal would give a local government to file its opposition.

Perhaps sensing these inequities, at least one industry commenter somewhat begrudgingly states that it would not object to giving local governments 30 days to respond. US West Comments at 21. As a practical matter, 30 days is the absolute minimum that local governments should be given to respond to a provider's petition. After all, the 10-day opposition, 5-day reply period in 47 CFR § 1.45(a) & (b) only applies where there is no other